Statement to the legislature by the Honourable Ian Scott Attorney General on reports by Manitoba and New Brunswick on The Meech Lake Accord

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ATTORNEY GENERAL

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CHECK AGAINST DELIVERY

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Mr. Speaker, last week a legislative committee in New Brunswick and a task force in Manitoba issued reports and proposed recommendations respecting ratification of the 1987 Constitutional Accord, or as it is more commonly called the Meech Lake Accord. At about the same time the Premier of Newfoundland circulated a letter addressed to the Prime Minister containing his observations on a number of substantive issues with regard to the Accord. It is my understanding that these observations will in due course lead to a set of proposals from Newfoundland for modifications to Meech Lake.

With the publication of the New Brunswick and Manitoba reports, the two provinces that have not yet passed the Meech Lake Resolution have now set out their reactions to the Accord. With the end of this phase, it is appropriate for Ontario to respond to these reports. I am pleased to table today an assessment prepared by my Ministry of the Manitoba and New Brunswick reports. On the basis of this assessment, I propose to comment briefly on the reports and on their implications for the future of constitutional evolution in Canada, bearing in mind that

these are reports made to the Premiers of their respective provinces and may not reflect the final position adopted by those governments.

The views expressed by Premier Wells also deserve careful consideration and a detailed response, but it would be unjust to address Newfoundland's position prior to the release by its Premier of its formal proposals.

The Meech Lake Accord is itself a phase in the ongoing process of constitutional renewal in Canada. Its immediate source is the patriation of the Canadian Constitution in 1982. That event was achieved without the concurrence of Quebec and over its objections. As a result, despite the promise in Ottawa and in numerous provincial capitals of a renewed federalism which featured prominently in the Quebec referendum of 1980, patriation and the entrenchment of a Charter of Rights and Freedoms were both accomplished without the formal agreement of a province representing more than a quarter of the population of our country. Faced with this reality, it was widely recognized that any further constitutional progress depended on a constitutional reconciliation with Quebec and on its return to full and willing participation in the Canadian constitutional family.

In spring 1986, the Government of Quebec circulated five proposals for securing Quebec's willing assent to the Constitution. These five points were:

1. Recognition of Quebec as a distinct society.
2. A greater provincial role in immigration.
3. A provincial role in appointments to the Supreme Court of Canada.
4. Limitations on the federal spending power.
5. A veto for Quebec on constitutional amendments.

These five proposals were greeted positively throughout Canada as a reasonable basis for renewing Canadian federalism. In August 1986 the Premiers of all the provinces meeting in Edmonton agreed to limit the next round of constitutional negotiations to Quebec's proposals and to defer other constitutional issues to subsequent rounds. This so-called "Quebec round" of constitutional negotiations culminated, almost a year later, in meetings first at Meech Lake and then at the Langevin Block. The result, unanimously agreed to by the First Ministers of Canada and its ten provinces, was the Meech Lake Accord.

I have dwelt at some length on the events leading up to the Meech Lake Accord because it is only by keeping this background in mind that one can understand and assess the agreement that was reached. The Meech Lake Accord was the result of a recognition that securing Quebec's active and willing participation in the constitutional process was a necessary prerequisite for any further constitutional development. It was based on a general agreement as to the basic reasonableness and acceptability of Quebec's five proposals for achieving that participation and it was made possible by a decision to limit the subject matter of that round of negotiations insofar as possible to these proposals and matters arising from them.

It follows, Mr. Speaker, that assessment of the unanimous Accord produced by the Quebec round must take place in the context of the history and of the process that produced it. The first point to note in this regard is that agreement was reached and a series of constitutional adjustments responsive to Quebec's five proposals were arrived at. The Meech Lake Accord does not settle once and for all the outstanding constitutional issues facing Canada, nor does it correspond in all its details to the position most favourable to any given province. The Accord is clearly a compromise. None of

the participants, including Quebec, was successful in achieving all of its goals.

The first question, then, that a legislature considering the Accord must ask itself is whether it agrees with the overall goal of securing national constitutional reconciliation based on Quebec's five proposals. If the answer is yes, then, recognizing that the Accord constitutes a compromise among many different parties with many different interests, the next question is whether any aspects of this particular compromise are so fundamentally flawed as to make it imposible to ratify the Accord without immediate change. There is no impropriety in pointing out imperfections and in suggesting improvements to the Accord, but if such suggestions do not attract unanimous approval, then, given the importance of the fundamental goal of constitutional reconciliation, no party should, without great care and thought for our future as a nation, make them preconditions for its agreement to the Accord as a whole.

It is in this evaluative context that the Select Committee of this Legislature that studied the Accord described it as "an enormously important piece of unfinished business in Canada's constitutional history." Although it concluded that there were improvements that

could be made in subsequent rounds, it recommended that the Accord be ratified by the Legislature in its existing form, as indeed it was.

In the same context Mr. Speaker I can inform you that in my judgement neither the New Brunswick nor the Manitoba report identifies any fundamental flaws that would justify reopening the Accord but that several of the preconditions for ratification proposed by Manitoba strike directly at the heart of the Accord and would amount to a rejection of the very principles upon which it is based.

Turning to the Report of the New Brunswick legislature, it is important to note that all of its observations and recommendations are made in the context of an acceptance of Quebec's five proposals and a recognition of the crucial importance of securing the overall goal of national constitutional reconciliation that underlies the Accord.

The New Brunswick report does contain a number of observations on what that committee considers to be shortcomings or oversights in the Accord. Some of these observations correspond to observations made by our own Select Committee. Others find no parallel in the Ontario Select Committee Report and indeed some of the proposed

modifications would likely be unacceptable in Ontario. These recommendations are, however, put forward as a basis for discussion for proposed improvement and not necessarily as preconditions for securing New Brunswick's assent to the Accord as a whole. On this basis, the concerns identified by New Brunswick can and should form the subject matter of ongoing discussions that, like the concerns and proposals raised by Ontario and others, will form part of the continuing process of constitutional evolution.

The report of the Manitoba Task Force proceeds differently. Although stating support for the Accord's overall goal of constitutional reconciliation, the Manitoba Report recommends that approval of the Accord be withheld unless six specific changes are made. As I have stated, it is my view that none of these six recommended changes address fundamental flaws that would justify reopening the Accord, but that several would go directly to its heart and would, in effect, reject three of the five proposals upon which the Accord is premised.

The first of Quebec's five proposals is recognition of its distinct society. The Accord addresses this proposal through its "linguistic duality/distinct society" clause.

The clear purpose of that clause is to respond to Quebec's proposal that it be recognized as a distinct society, while safeguarding the rights of linguistic minorities both in Quebec and in the rest of Canada and without changing the division of powers under the Constitution.

It is important to emphasize that this clause does not confer any new powers on the Province of Quebec. This was the conclusion reached by the Ontario Select Committee and I am pleased to note that this conclusion is not contradicted by either the Manitoba Task Force or the New Brunswick Select Committee.

Although the Manitoba Task Force states its support for recognizing Quebec's distinct society, it recommends that the "linguistic duality/distinct society" clause not be ratified unless three specific changes are made. As I have suggested, in assessing these proposed changes it is necessary to consider whether they respond to fundamental flaws in the Accord and, beyond that, whether they would be consistent with the principle underlying the Accord, of effective constitutional recognition of Quebec's distinct society.

The first proposal recommends withholding assent to the Accord unless the list of fundamental characteristics referred to in this clause is expanded beyond the recognition of Canada's linguistic duality and Quebec's distinct society. No doubt, as the Ontario Select Committee noted, it would be symbolically appropriate and indeed preferable, that the list of fundamental characteristics of Canada be fuller and more comprehensive. The purpose, however, of this particular clause is not to list all the fundamental characteristics of Canada but merely to identify and give constitutional recognition to two characteristics that have not previously been entrenched as interpretive principles. Other possible fundamental characteristics, including multiculturalism and aboriginal rights are already recognized in other clauses of the Constitution. Bearing in mind the purpose of the clause, the omission of a fuller list is surely not a fundamental flaw.

A second objection raised to the "linguistic duality/distinct society" provisions relates to the "non-derogation" clause. This provision specifies that nothing in the "linguistic duality/distinct society clause" is meant to derogate from multiculturalism as an interpretive principle nor from existing aboriginal rights and treaties recognized in the Constitution. The worst

that can be said about this provision is, as numerous constitutional scholars have noted, that it is redundant since there is nothing in the Accord capable of derogating from the constitutional protections of multiculturalism and aboriginal rights. The Manitoba Task Force, however, recommends that the Accord not be ratified unless the non-derogation provision is expanded to include the Canadian Charter of Rights and Freedoms. Mr. Speaker, Canadian courts are already using the concept of the distinctness of Quebec's society as an interpretive tool with regard to the Canadian Charter of Rights and Freedoms, especially when they come to consider--as the Constitution requires them to do--whether a particular provision is demonstrably justifiable in a free and democratic society. The Manitoba Task Force's proposal would prevent courts from looking at Quebec's distinct society in such circumstances. In other words, not only is the Manitoba proposal not addressed to a fundamental flaw in the Accord, its result would be to overturn the status quo and leave Quebec with less legal recognition of its distinct society than it now enjoys!

A similar observation may be made with regard to the recommendation to withhold ratification unless the Quebec's role is described as "upholding" rather than as at present, "preserving and promoting" its distinct

identity. Given that the existing clause does not confer any new powers on Quebec, this change either has no impact and is therefore not addressed to a fundamental flaw requiring immediate correction, or it represents an attempt to take away something already enjoyed by Quebec. In that case it, too, would be inconsistent with the basic principles underlying the Accord.

A second cardinal principle among Quebec's proposals was a limitation on the spending power as applied to shared cost programs. In such programs, whose constitutionality has never been tested, the federal government initiates programs in areas that the Constitution assigns exclusively to the provinces and provides a portion of the funding. The benefits to the provinces of federal funding are obvious, but in order to enjoy these benefits, a province must either accept priorities and provisions different from those it might choose for itself, or risk losing federal assistance. If the province decides not to participate, its citizens will see a portion of the federal income tax they pay spent elsewhere by Ottawa on a social program from which they derive no benefit at all. The solution proposed by the Accord is, for the first time, to confirm the right of the federal government to set national objectives in areas of exclusive provincial jurisdiction, but to balance such

right with the right of a province, not only to "opt out" of the program, but also, so long as it institutes a program of its own that is compatible with the national objectives, to be entitled to compensation from the federal government. Far from being an example of a massive and unwarranted transfer of power to the provinces as has some times been claimed, this provision in fact simply proposes modest limits on an extension of federal power into the realm of provincial jurisdiction.

The Manitoba Task Force recommends withholding ratification of the accord unless this clause is deleted from the Accord because it finds the clause "controversial". This rejection of a provision whose fundamental flaw is never clearly identified amounts to a rejection of any qualification on the federal spending power and would likewise constitute a rejection of a second of Quebec's five proposals.

Prior to the patriation of the Constitution in 1982, it was generally thought that Quebec had by convention acquired a right not to have constitutional change imposed on it without its consent. This assumption proved to be incorrect, and under the terms of the Constitution Act, 1982 constitutional amendments in a number of areas are capable of being made on the basis of

the consent of the federal government and two-thirds of the provinces representing fifty percent of the population of Canada. The Accord responds positively but within limits to the essence of Quebec's proposal to limit such unconsented constitutional change.

The Accord recognizes the principle that constitutional change to significant national institutions ought not to be imposed on a province against its will. It also recognizes the principle that all provinces and not just Quebec ought to benefit from this right. It therefore selects a small class of national institutions and requires that amendments to these be subject to unanimous consent. For other constitutional amendments, two thirds and fifty per cent remains the "general" formula.

The Manitoba Task Force concludes that a requirement of unanimity will make more difficult the prospect of Senate reform and therefore recommends refusing ratification unless reform of the Senate be made subject to the "general" amending requirement rather than unanimity.

Other provinces no less committed to Senate reform than Manitoba, have concluded that the principle of

the equality of all provinces which is a key component of their vision of Senate reform, requires that all provinces must have an equal right not to have national institutions changed against their will. Many observers have noted that on a practical level, no reform of so vital an institution as the Senate can occur without Quebec's participation, but in any event the Manitoba Task Force's position would amount to a rejection of yet another of Quebec's five proposals.

The remaining three recommendations for changes to the Accord put forth by the Manitoba task force, while not amounting to repudiations of Quebec's five proposals, nevertheless propose withholding approval of the entire Accord unless relatively minor amendments are made to particular provisions. However worthy of consideration and possible future action such suggestions may be, none can reasonably be characterized as aimed at so fatal a flaw as to justify allowing the Accord to fail if it is not adopted as an amendment.

Mr. Speaker in 1987 a hand of friendship and reconciliation was extended to Quebec in the form of the Meech Lake Accord. The Accord itself is a balanced set of modest constitutional adjustments that fairly reflects the evolving relationship amongst all the parties to

Confederation. As the Ontario Select Committee reported there is room in the Accord for improvement and further constitutional development. But without the Accord it is doubtful whether any constitutional growth is possible. That is the spirit in which the Ontario Select Committee made its recommendations for future improvements to the Accord and to the constitution. It is to be hoped, Mr. Speaker, that those who have now made us aware of the concerns voiced in various quarters will at this point join in a process of addressing these concerns within the framework of reconciliation embodied in the Accord. It is time, Mr. Speaker to take careful note of the importance and sensitivity of the point in our nation's history at which we now find ourselves. It is a moment that requires those who find fault with the compromises in the Accord to take careful stock of the seriousness and significance of their concerns and to weigh them realistically against the consequences of turning a moment of national reconciliation into a moment of national estrangement.

It is profoundly to be hoped that in the weeks and months ahead, such reflection will lead to a determination to seize an opportunity that may not soon present itself again and to ensure agreement to the necessary first step in the continuing evolution and improvement of our constitution and of our nation.